No. 44942-1-II

(Cowlitz County Superior Court No. 12-2-00304-2)

COURT OF APPEALS,
DIVISION II,
OF THE STATE OF WASHINGTON

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COLUMBIA RIVER CARBONATES,

Appellant,

vs.

PORT OF WOODLAND, PORT COMMISSION OF THE PORT OF WOODLAND, and CRRVP LLC,

Respondent,

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# REPLY BRIEF OF APPELLANT

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Charles A. Klinge, WSBA # 26093
W. Forrest Fischer, WSBA #44156
Attorneys for Appellant

GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004

Telephone: (425) 453-6206

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## INTRODUCTION

This Reply Brief by Plaintiff/Appellant, Columbia River Carbonates ("CRC"), responds to the Brief of Respondent filed by the Port of Woodland ("Port") and the Brief of Respondent filed by CRRVP LLC—the owner of the RV Park ("CRRVP").

CRC contends that this case raises important legal issues regarding the scope and meaning of the Constitutional prohibition on gifts of public property. Art. VIII, Sec. 7 ("the Gift Clause"). The Port and the CRRVP disagree. Each Respondent argues that Gift Clause review is limited to the legal sufficiency test—*i.e.* the "peppercorn" test—which means results in no judicial oversight at all. In particular, Respondents fail to provide substantive rebuttal to CRC's charge that the unobligated credit for improvements—barred by the Port Lease—is a sufficient showing of donative intent to justify closer scrutiny of consideration. (Issue 6). As stated by the Washington Supreme Court: "We use the donative intent element to determine how closely we scrutinize the sufficiency of the consideration, 'the key factor.'"[1] Respondents' position is that the courts should never undertake a close scrutiny of the amount of consideration. However, this radical position simply cannot be squared with the

[1] *City of Tacoma v. Taxpayers of City of Tacoma,* 108 Wn.2d 679, 703 (1987) (quoting *Adams v. University of Washington,* 106 Wn.2d 312, 327, (1986)).

Constitution. Rather, CRC contends that the framers of the State Constitution intended the Gift Clause to have meaning, to provide a check on government giveaways, and judicial oversight. This Court should steady the erosion of the Gift Clause by holding that the "sweetheart deal" in this case justifies judicial scrutiny of the facts to determine whether a Constitutional violation has occurred.

Apart from the Gift Clause issue, Respondents seem to make some points that sound reasonable—that is until the facts are checked. *See* CRC Br. at 4-17 (Statement of the Case). For example, Respondents are apt to repeat the statement that the Port obtained two appraisals as if that inoculates it against any violations of the Gift Clause. But what Respondents fail to mention or address is that actual sales price of the Subject Property was significantly less than the lowest appraisal—by 35%. Indeed, even after obtaining and reviewing these appraisals, both the Port and CRRVP did not accept them as stating an appropriate sales price. Rather, the Port and CRRVP discredited and discounted the appraisals in order to further their real goal: "CRRVP negotiating ***to get the price of the property down to what it wanted to pay***." CRRVP Br. at 27 (emphasis added). This brazen desire of the RV Park to achieve its self-interest must be met with judicial oversight. Respondents' assertions of an open public process, an arms-length transaction, etc., are empty rhetoric given that

neither Respondent even mentions, let alone explains, the numerous contrary facts which evidence a targeted, direct sale to CRRVP—such as the Port and CRRVP colluding to "***keep the chatter down***." CP 231-2.

Ultimately, for these and other reasons given within CRC's Opening Brief and this Reply Brief, the Court should reverse the contested rulings of the trial court.

## ARGUMENT
## I.
## *KING COUNTY V. TAXPAYERS* DID NOT "EVISCERATE" THE CONSTITUTIONAL BAR ON GIFTS OF PUBLIC PROPERTY

When comparing Respondents' respective reply briefs to CRC's Opening Brief, one quickly ascertains that Respondents chose largely to ignore the facts, evidence, and arguments presented by CRC. Such is the case in Respondents' analysis of CRC's Gift Clause claim. Nevertheless, CRC will briefly summarize its argument within its Opening Brief and then address those arguments presented by Respondents.

CRC's Opening Brief sets forth the traditional legal standard applicable to Gift Clause cases—namely that a showing of donative intent **or** grossly inadequate return **requires scrutiny of consideration**. CRC Br. at 36-40. Scrutiny of consideration means that mere satisfaction of the legal sufficiency test—*a.k.a.* the peppercorn test—is inadequate to comply with the an analysis under the Gift Clause. To support its arguments, CRC

relies upon the Supreme Court decision in *City of Tacoma v. Taxpayers of City of Tacoma,* 108 Wn.2d 670 (1987) wherein the traditional legal standard is outlined. CRC's Opening Brief then applies this standard in demonstrating why CRC made a sufficient showing of grossly inadequate consideration and donative intent which in turn justifies a closer scrutiny of consideration paid by CRRVP to the Port for the Subject Property. CRC Br. at 40-45. CRC's position is that the **trier of fact** should consider all the facts and determine whether the Subject Property was worth $206,000—as determined by CRC's expert (Appendix E to CRC Br.; CP 640)—or whether the price paid for the Subject Property—about $38,000—was fair consideration to the Port. Recognizing the trial court's misconception of *King County v. Taxpayers of King County*, 133 Wn. 2d 584, 588 (1997) during its oral ruling—stating that it "eviscerated" the Gift Clause[2]—CRC presented substantial briefing to explain and distinguish the *King County*. CRC Br. at 45-49.

In spite of CRC's in-depth briefing, the Port provides almost no analysis of the *King County* case at all. Instead, the Port merely provides a large block quote from the case with two paragraphs of conclusionary argument which provides its own interpretation of the holding in *King County*. Port Br. at 33-34. Even then, the Port's conclusion is predictable,

[2] Verbatim Report of Proceedings ("RP"), May 8, 2013 at p. 17, lines 16-18.

arguing that the *King County* case "made it clear" that "legal sufficiency of consideration is the standard when considering a claim of gifts of government funds" and that the legal sufficiency is always determined on summary judgment. Port Br. at 34.[3]

In making these arguments, the Port's Brief provides no rebuttal to the points made by CRC addressing the *King County* case—namely that the Supreme Court followed the traditional legal standard as stated in *City of Tacoma v. Taxpayers*. CRC Br. at 46. That is to say, the Court analyzed both donative intent and whether there was grossly inadequate return. Specifically, the Supreme Court determined that the issue of donative intent had been decided in the prior lawsuit. *King County*, 133 Wn.2d at 599 (citing *CLEAN v. State*, 130 Wn.2d 782 (1996). CRC Br. at 47. The Supreme Court also evaluated the issue of grossly inadequate return. CRC Br. at 48. Altogether, the Supreme Court in *King County* did not "eviscerate" the Gift Clause jurisprudence; on the contrary, the Court followed the traditional formulations and analysis of a Gift Clause claim. On these important points within *King County*, the Port is silent.

Commensurate with the Port's silence on the issues, CRRVP similarly fails to address these points raised by CRC and its analysis of the *King County* case. Instead, CRRVP first quotes the Court of Appeals

[3] It should be noted that the Port provided no briefing below, but simply joined the briefing by CRRVP on the first motion. CP 82-83.

decision in *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491 (1993), arguing that no in-depth analysis of the consideration should be held apart from legal sufficiency. CRRVP Br. at 22. However, CRRVP misconstrues the analysis in *Northlake,* as it relies heavily on the Supreme Court's discussion in *Tacoma v. Taxpayers* which actually employs the **traditional legal standard** analysis as discussed above.

Next, CRRVP relies heavily on language within the dissent by Justice Sanders in *King County*, but fails to provide any discussion into the ultimate holding in the case—*i.e.* what the Majority actual said or relied upon together with its analysis. CRRVP Br. at 22-23, 28-29. If CRRVP had addressed the Majority in *King County*, it would have discovered that, contrary to Justice Sanders' spirited rhetoric in dissent, the Court evaluated whether there was a showing of donative intent or grossly inadequate consideration. CRC BR. 46-48. In other words, *King County* employed the traditional legal standard. *Id.*

CRRVP makes the same mistake of disregarding the Majority decision within its citation and reliance upon the subsequent Washington Supreme Court decision in *CLEAN v. City of Spokane*, 133 Wn.2d 455 (1997). CRRVP Br. at 23-24. Instead, CRRVP merely quotes Justice Sanders' dissent, and concludes that the *King County* case "adopted a 'legally sufficient' consideration test" for the Gift Clause. CRRVP Br. at

24 (citing *CLEAN v. City of Spokane*, 133 Wn.2d at 477 (Sanders, J., dissenting)). But, CRRVP's conclusion is belied by the Majority decision in which the Court applied the traditional legal standard.

The Court in *CLEAN v. City of Spokane* explained the traditional legal standard as follows:

> [W]e turn to the second prong of the *CLEAN* test[4]—whether there was consideration or donative intent. We addressed this issue in *City of Tacoma v. Taxpayers,* 108 Wn.2d 679, 703, 743 P.2d 793 (1987):
>
> "Unless there is a proof of donative intent or a grossly inadequate return, courts do not inquire into the adequacy of consideration." (Italics ours.) Adams [v. University of Wash., 106 Wn.2d 312, 327, 722 P.2d 74 (1986) ].... Absent a showing of donative intent or gross inadequacy, trial courts should only apply a legal sufficiency test, under which a bargained-for act or forbearance is considered sufficient consideration.
>
> Appellants fail to prove either that the City intended to donate public funds to the Developers or that the consideration received for the City's participation in the project is "grossly inadequate." In exchange for its assistance, the City will receive a parking garage—an item that would unquestionably constitute legally sufficient consideration.

*CLEAN v. City of Spokane*, 133 Wn.2d at 469-70.[5] This analysis by the Supreme Court was made ***after its decision*** in *King County*. Accordingly,

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[4] The first prong is whether the actions servers a fundamental purpose of government—which is not claimed by Respondents here.

[5] CRRVP criticizes CRC for relying on 1987 *City of Tacoma v. Taxpayers* case and hence failing to recognize the "1997 change in jurisprudence" (CRRVP Br. at 24, n.9) without acknowledging that the Supreme Court's 1997 cases relied on the same case.

this fact demonstrates that Justice Sanders was incorrect in his frustration that the Court had "emasculated" the Gift Clause. To the contrary, the Supreme Court in *CLEAN v. City of Spokane* clearly evaluated whether the plaintiff made a showing of donative intent or grossly inadequate return. Only after finding none, did the Court apply the legal sufficiency test. *Id.*

In addition to failing to address the facts listed above, CRRVP also confuses the concept of summary judgment as it applies to the analysis within Gift Clause cases. CRRVP Br. at 28. The Washington Supreme Court, ***in discussing the legal sufficiency test***, stated that:

> The adequacy of the consideration for the lease is a question of law. Whether a contract is supported by consideration is a question of law and may be properly determined by a court on summary judgment.

*King County v. Taxpayers*, 133 Wn. 2d at 598 (citation omitted).[6] What CRRVP fails to recognize is that, although the Court in *King County* stated that ***legal sufficiency*** may be decided on summary judgment, it did not address what happens when plaintiff ***has made a sufficient showing*** of donative intent or gross inadequacy. Rather, in such cases when a sufficient showing has been made—as CRC contends here—the trier of fact needs to undertake a closer scrutiny of consideration because the

[6] CRRVP misquotes these two sentences by conflating them into one. CRRVP Br. at 28.

existence of legally sufficient consideration is not enough to withstand a Gift Clause challenge.

In spite of the evidence provided by CRC, Respondents take the distorted and radical position that "the legal sufficiency supporting the Port's sale to CRRVP ***defeats any claim*** of donative intent or grossly inadequate consideration." CRRVP Br. at 29 (emphasis added). Since legal sufficiency is the peppercorn test, Respondents' view turns the traditional legal standard upside-down in a manner which eliminates any and all review by the courts, rendering the Constitution Gift Clause completely impotent. Simply stated, Respondent's argument defangs any challenge under the Gift Clause given that **any amount of consideration** paid for public land will pass legally sufficiency—no matter how grossly divergent the sale price is from its appraised value. Fortunately, Respondents' litigation position is not the law, and the traditional legal standard analysis still controls.

For example, assume the government obtained two appraisals of public land, valuing it as $27,000 and $25,000, but then sold the land for $1,000. Such a sale would clearly not pass the gross inadequacy standard—though it would nevertheless pass the legal sufficiency test. This is the logical extension of the Respondents' argument which, if applied, would inoculate such a misappropriation of public assets from

judicial remedy. In another example, assume the government held the same two appraisals, but then sold the land at the discounted price of $15,000 to help out a business person friend of an elected official in spite of the fact that there were two other bids to buy the property for $30,000 and $32,000. Again, legal sufficiency would be satisfied even though a clear issue of donative intent is present. Respondents contend that the Courts cannot scrutinize the consideration or facts in either case under the Constitutional Gift Clause.

As these simple hypotheticals demonstrate, Respondents' interpretation of the law is flatly wrong. Indeed, for the Court to accept Respondents' view is to hold that the Constitutional Amendment prohibiting the gift of public property has no preclusive effect to preventing abuse of government power and waste of taxpayer resources.

## II.
## GIVING CRRVP AN UNOBLIGATED CREDIT SUFFICIENTLY DEMONSTRATES THE PORT'S DONATIVE INTENT

CRC's Opening Brief thoroughly discusses the donative intent issue and, in particular, whether the credit for improvements barred by the Port Lease was a sufficient showing of donative intent to require scrutiny of consideration. CRC Br. 41-45.

The Lease provides that it does not, "create any responsibility on the part of the Landlord [the Port] to pay for any improvements,

alterations or repairs occasioned by the Tenant [CRRVP]." CP 135 at §8(g). The Lease continued in effect right through to the closing of the sale to CRRVP. CP 634, 636. The Lease is unambiguous in barring reimbursement for improvements. Yet, that is precisely what occurred. As stated by CRRVP's owner, Shirley Temming, in her Declaration:

> After signing the lease, we continued to clean up the property, and graded the property, providing a gravel parking area, landscaping and landscape irrigation.

CP 34, at ¶ 7.[7] Here, it was undisputed that the $17,000 credit on the selling price was expressly for tenant improvements under the lease. CP 289. The Port's Memorandum explained the tie between the credit and the leasehold improvements:

> Additionally, ***the port recognizes*** the cleanup of trash, removal of blackberries and improvements (while the property has been under a lease from the port) including a gravel parking area on the property, paid for and maintained by Columbia Riverfront RV Park which amounts to approximately $17,000 (as reported by CRVVP [sic]) ***as a tenant improvement and includes that amount in the offered selling price below.***

CP 289 (emphasis added). CRC contends that this unobligated credit demonstrates donative intent sufficient enough to warrant that Court to go beyond the legal sufficiency test and evaluate adequacy of consideration.

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[7] The record contains various statements as to the cost of these leasehold improvements. The Temming Declaration states the amount as $29,000, however she produced no receipts or other documentation to support this bald assertion. CP 34, ¶ 7. CRRVP's letter to the Port represented that the cost was $14,000. CP 169.

To support its position, CRC's discussed the Supreme Court's finding of an illegal gift for promotional hosting by Port Districts in *State ex rel. O'Connell v. Port of Seattle*, 65 Wn.2d 801, 806 (1965).[8] That case distinguished pensions based on a contracted "obligation to pay." *Id.*, CRC Br. at 41-42. CRC's Opening Brief also discussed the finding that a gratuity for meals was not found to be a gift due the expectation of a tip for services rendered in *City of Bellevue v. State of Washington*, 92 Wn.2d 717, 720-722 (1979). CRC Br. at 42. Altogether, CRC contends these and other cases make the existence of an obligation the key point, and distinguish a gift as occurring when no obligation is present. CRC Br. at 42-43.[9] Here, the Port was not obligated to afford the credit for improvements—just the opposite, the Port's lease clearly stated that the Port would not reimburse CRRVP for such improvements.

Here, CRRVP does not provide any rebuttal argument to the cases presented by CRC which establish that the lack of any obligation to afford the credit for improvements makes said credit a gift. Instead, CRRVP endeavors to recast the argument by stating that the credit for

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[8] The Constitution was later amended to narrowly allow the specific custom of promotional hosting of private individuals. Art. VIII, Sec. 8 (Amend. 45, 1965).

[9] *See e.g., Scott Paper Co. v. City of Anacortes,* 90 Wn.2d 19, 28 (1978) (selling municipal water at below current cost was not a gift of public funds because the City had contracted years earlier to supply it at a fixed price); *State ex rel. Madden v. Pub. Util. Dist. No. 1 of Douglas Cnty.*, 83 Wn.2d 219, 223 (1973) (no gift of public funds when the government was statutorily required as part of compensation for condemnation, to grant a perpetual easement).

improvements "is irrelevant" and that the Lease provision "has nothing to do with setting the purchase price for the property." CRRVP Br. at 25-26. However, CRRVP's assertions are merely revisionist history—the Port directly linked the credit to the lease in the Port Memorandum quoted above: "the port recognizes [the improvements] as a tenant improvement ***and includes that amount in the offered selling price below.***" CP 289 (emphasis added). CRRVP goes on to claim that the Lease is irrelevant because this is just a "negotiation" between two parties, and as explained by CRRVP: "It was CRRVP negotiating ***to get the price of the property down to what it wanted to pay.***" CRRVP Br. at 27 (emphasis added). Of course, this is precisely the problem that the Gift Clause is intended to prevent—ensuring that the Port does not fall prey to a self-interested buyer that is concerned, not with paying adequate consideration, but merely paying "***what it wanted to pay.***"

Like CRRVP, the Port never mentions or addresses CRC's arguments pertaining to donative intent. As noted above, the Port provided no briefing below, but simply joined the briefing by CRRVP on the first motion. CP 82-83. Instead of addressing the issues presented, the Port presents a new issue not raised below. While raising a new issue is likely improper under RAP 2.5(a), the issue and argument has nevertheless been firmly rejected by the Supreme Court.

The Port cites to the 45th Amendment to the State Constitution that added Section 8 to Article VIII stating that funds expended by port districts, "in such manner as may be prescribed by the legislature for industrial development or trade promotion and promotional hosting," shall not be deemed a gift under the Gift Clause, Article VIII, Section 7. Here, the Port argues that this Amendment, together with the statutory authorization to sell surplus property in RCW 53.08.090, "implies that sales of Port property can be made ***for any price*** without being deemed a gift of public property." Port Br. at 31 (emphasis added).

This Court need not accept the Port's completely unsupported argument given that the Supreme Court addressed essentially the same argument in *Port of Longview v. Taxpayers of Port of Longview*, 85 Wn.2d 216, 533 P.2d 128 (1975) *amending* 84 Wn.2d 475, 527 P.2d 263 (1974). In that case, the Ports argued that Section 8 (Amendment 45) effectively repealed Section 7, such that the Ports were allowed to expend funds as desired, *i.e.* for a financing lease agreement intended to benefit private parties. 533 P.2d at 129. The Supreme Court explained that Amendment 45 was a direct response to decisions in *State ex rel. O'Connell v. Port of Seattle*, 65 Wn.2d 801 (promotional hosting violates gift clause) and *Hogue v. Port of Seattle*, 54 Wn.2d 799 (1959) (taking land to be sold to different private party for industrial purposes failed

public use requirement). The Supreme Court firmly rejected the Ports' argument with citation to the ballot pamphlet and the official explanatory comments by the Attorney General. The Court concluded that Section 8 did not repeal Section 7 in relation to Port Districts and that the financing lease agreement an illegal gift of public funds. *Id.* at 129-130.

The *Port of Longview* case applies here. The Port does not assert that the sale of the Subject Property to the RV Park was for industrial purposes—the sale was to a private, commercial recreational business. The Port's argument that Section 8 supersedes Section 7 must be rejected.

Altogether, the credit for improvements was barred by the Lease and thus was an unobligated credit—proof of donative intent. There were many other facts supporting proof of donative intent as set forth in CRC's Opening Brief. CRC Br. at 4-17 (facts) and 41-45 (discussion). Also, Section 8 to Article VIII of the State Constitution does not apply to private sales of public property for no industrial and promotional purposes. Altogether, the facts presented by CRC evidence the Port's donative intent such that the adequacy of consideration must be scrutinized.

## III.
## CRRVP'S EQUITABLE BONA FIDE PURCHASER FOR VALUE DEFENSE, DOES NOT TRUMP CRC'S STATUTORY CLAIMS

CRRVP's equitable defense based on bona fide purchaser for value ("BFP") is set forth as Issue 3. CRC Br. at 3. Notably, the Port provides

no argument is support of the BFP defense. The trial court ruled that the BFP defense precluded CRC's statutory claims based on illegal sale (RCW 53.08.090) and on violation of the Open Public Meeting Act ("OPMA"). CP 462-464. The trial court ruled that the claim for illegal gift of public property was not precluded by the BFP defense, and CRRVP did not cross-appeal that ruling or argue otherwise here.

CRC's Opening Brief explains why the BFP defense does not apply to CRRVP in this situation— namely because CRRVP did not act in good faith, had unclean hands, did not pay the appraised value, and did not pay market value. CRC Br. at 29-33. In addition to these, CRC also contends that the OPMA is substantive in nature, and thus not subject to avoidance by the BFP defense—which is largely procedural. CRC Br. at 33-34. CRRVP utterly fails to address these arguments.

Not surprisingly, CRRVP has no response at all to the allegation that it acted in bad faith and with unclean hands in obtaining the Subject Property from the Port. CRRVP does not mention, let alone deny, that its representatives urged the Port to keep the sale discussions out of public meetings, requesting that: "any discussions pertaining thereto ***no[t] be part of the meeting agenda or conversations***." CRC Br. at Appendix C; CP 231-2. (emphasis added). When the Executive Director agreed and stated that he would "strike" the public update, "***and have private conversations***

***with the individual commissioners instead.***" *Id.* CRRVP's response was that: "***I'd prefer a Private update. Just to keep the chatter down.***" *Id.* (emphasis added). These and other facts demonstrate the bad faith and unclean hands of CRRVP. Instead of disputing these collusive facts, CRRVP ignores them and has the audacity to call its actions "arm's-length negotiations." CRRVP Br. at 21.

CRRVP also has no response to the charge that it paid below the appraised value—a fact which was a key consideration for the court's analysis in *South Tacoma Way LLC v. State of Washington,* 169 Wn.2d 118, 120 (2010). It is undisputed that the low appraisal was for $65,000 and CRRVP paid only $44,000—a 35% reduction.[10] Instead, after admitting that the West appraisal was for $65,000, CRRVP weakly states that it negotiated a reduction for work on the Subject Property. CRRVP Br. at 21. But, elsewhere CRRVP explained the facts differently, namely it said that: "It was CRRVP negotiating ***to get the price of the property down to what it wanted to pay.***" CRRVP Br. at 27 (emphasis added). The unobligated credit for improvements was just part of this intention—to get the price down to what CRRVP wanted to pay.

Instead of addressing these points, CRRVP merely provides block-quoted language from *South Tacoma Way.* CRRVP Br. at 19-20. CRRVP

[10] When the sliver to the north is excluded, the appraised value of the Subject Property was about $58,000 and the price paid was about $38,000.

cites *South Tacoma Way* for the premise that a BFP can enforce a procedurally irregular land sale, but fails to address exactly how *South Tacoma Way* and the case at hand are analogous.[11] *Id.* Conversely, CRC specifically addressed the *South Tacoma Way* case within its opening brief and discussed at length how it was entirely distinguishable from this case. CRC Opening Br. at 30. Namely, *South Tacoma Way* truly involved a mere procedural irregularity—a failure to provide notice (*id.* at 126)—as opposed to a substantive failure to legally designate the property surplus or to obtain a fair price. CRRVP does not even respond to CRC's contention that the OPMA imposes substantive requirements that cannot be precluded by the BFP defense. CRC Br. at 33-36.

CRC's contends that the holding in *South Tacoma Way* was a specific exception to the general rule that the BFP doctrine applies only to "situation in which two putative titleholders existed," which does not apply here.[12] *Id.* at 127; CRC's Opening Br. at 30. The facts in this case are simply too dissimilar from those presented in *South Tacoma Way* for it to be binding. As such, *South Tacoma Way's* extension of the BFP doctrine outside the realm of "two putative titleholders" does not apply to

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[11] Indeed, it should be pointed out that CRRVP's sole reliance on the *South Tacoma Way* case is a functional admission that the Port's sale of the Subject Property was procedurally flawed.

[12] Accordingly, the court's holding in *South Tacoma Way* is limited by its specific facts under the fundamental principle of *stare decisis*. *See Floyd v. Dep't of Labor & Indus.*, 44 Wn.2d 560, 565 (1954)

this case—rather only to those cases with homogenous facts.

Accordingly, for these and the other reasons within CRC's opening brief the Court should reverse the trial court and rule that the BFP defense does not apply to this case.

## IV.
## THE TRIAL COURT IMPROPERLY DISMISSED CRC'S OPEN PUBLIC MEETING ACT CLAIM GIVEN THAT IT WAS NOT PROPERLY BEFORE IT

CRC raises the OPMA in its Issues 3 and 4. First, Issue 3 argues that the BFP defense applicable to mere procedural irregularities cannot bar the substantive nature of OPMA claims. As explained above, the Port did not address the BFP defense at all, and CRRVP failed to respond specifically to whether OPMA claims could be barred by the BFP defense. As to Issue 4, CRC argues that the trial court improperly dismissed the OPMA claim *sua sponte*. On this issue, the Port totally misstates the procedural history and otherwise provides information supporting CRC's claim. CRRVP's arguments are similarly misplaced.

CRC's Issue 4 goes to whether CRC was provided an adequate opportunity to develop its claim. Both the Port and CRRVP go further to argue the merits of that claim, but in doing so, Respondents misstate the law. The Port admits that the information and updates about the sale were provided to the Port Commissioners in closed executive session, yet the

Port claims no violation occurred because no direction was given to the Executive Director. Port Br. at 27. Similarly, CRRVP admits that the Port Commissioners received an update in closed executive session, but that no decisions were made. CRRVP Br. at 32.

Respondents mistakenly believe that only a vote or other decision making, *i.e.* final action, is barred in closed executive session, citing RCW 42.30.020(3). That view is wrong. The OPMA broadly defines "Action" as "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." RCW 42.30.030(3). The statute then defines "final action" to include votes and decisions. Here, Respondents admit that the Port Commission was "considering" or "reviewing" information about the sale. The Supreme Court ruled that any "Action" as broadly defined must occur in a public meeting unless an exception applies in *Miller v. City of Tacoma*, 138 Wn.2d 318, 325-327 (1999). Regarding exceptions, the Supreme Court made it clear that those are to be narrowly construed to limit action in executive session.

*Miller v. City of Tacoma* applies here. Respondents essentially admit that "action," as broadly defined, occurred in closed executive session. The narrow construction of the only relevant exception does not

save the Port. RCW 42.30.110 provides only for consideration of the minimum price at which real estate will be offered for sale "when public knowledge of such consideration would cause a likelihood of decreased price." When narrowly construed as required by *Miller v. City of Tacoma*, the information reviewed went well beyond what is needed to determine minimum price. Executive Director Holmberg testified that after updating the Commissioners in executive session, their "response was to go ahead and move forward," and that "they would take action at the next commission meeting." CP 389 (Holmberg Depo. at 135:21-25, 136:1-7). Besides, public knowledge would likely have caused an increased price, not a decreased price.

The trial court never reached the merits of the OPMA violation—rather, it first ruled that the OPMA was barred by CRRVP's BFP defense, only to then modify this ruling and hold that there was no proof of an OPMA violation. RP 8/17/2012 at 8:11. It was this latter ruling that CRC attacks as erroneous in Issue 4. Regarding Issue 4, the Port is wildly off the mark in arguing that CRC had two motions and the depositions of the Port Commissioners to come up with evidence of an OPMA violation. Port Br. at 28. The trial court dismissed the OPMA claim in the first motion for summary judgment and the depositions of the Port Commissioners were after the first motion.

CRRVP essentially admits that its original Motion did not include the OPMA claim, instead CRRVP points to a statement in its reply brief that it was seeking summary judgment on the OPMA claim. CRRVP Br. at 31. But, CRRVP presented absolutely no evidence or argument on the claim, instead CRRVP had just that one mention—within the concluding paragraph of its reply. And yet, it is upon the shoulders of this solitary, throw-away sentence given at the conclusion of its reply, that CRRVP is resting its argument that it had been moving for summary judgment on OPMA all along. Sheer reason and mere glancing review of the pleadings obliterates this argument.

Nevertheless, even if the court accepts CRRVP's argument that it did, somehow, move for summary judgment on CRC's OPMA claim, CRRVP failed to refute the fact that a claim under the OPMA is an important substantive claim which cannot be defeated by the BFP defense. This fact was fully briefed by CRC in its opening brief, and thus will not be reproduced here. CRC Br. at 33-34. Suffice it to say, CRRVP did not address any of these arguments.

Finally, the trial court still ultimately erred in granting summary judgment given fundamental summary judgment standards because **it is the burden of the moving party** to show the absence of an issue of material fact and to demonstrate why it is entitled to a judgment in its

favor. *Tran v. State Farm Fire & Cas. Co.,* 136 Wn.2d 214, 223 (1998). Thus, it is only after the moving party meets its initial burden that the nonmoving party must demonstrate that a triable issue remains. CR 56(e).

Here, the trial court in apparently making an alternate ruling that there was no proof of an OPMA violation misapplied the summary judgment standard. Specifically, CRRVP argues that it was entitled to summary judgment on the OPMA claim because "**CRC presented no facts** in support of this claim." CRRVP Br. at 31 (emphasis added). In other words, CRRVP claims that it was CRC's burden to provide evidence supporting its OPMA claim, in spite of the fact that CRRVP itself provided zero evidence or even any argument within any of its briefing below. Again, as stated above, CRRVP only mentions the OPMA claim once—and only in passing within the conclusion of the last brief filed during the first summary judgment. Even the most liberal interpretation of the moving party's burden under summary judgment would find CRRVP's lack of evidence and argument to be insufficient.

Altogether, given the above together with the arguments presented in CRC's Opening Brief, the trial court erred in granting summary judgment on the OPMA claim given that it was never squarely before it.

## V.
## THE SURPLUS DESIGNATION AND SALE VIOLATED RCW 53.08.090

CRC's Opening Brief led with the statutory claims based on the Port statutes, namely RCW 53.08.090, to conform to the principle of avoiding constitutional issues if possible. CRC Br. 18-29. The trial court denied CRC's cross-motion for partial summary judgment on these claims—namely that the surplus designation and sale itself were illegal (CP 86-7), stating that these claims were barred procedural claims under CRRVP's defense. RP, 8/17/2012 at 8:5-21. Thus, the trial court did not reach the merits of CRC's claims, but the merits are clearly before this Court, due to CRC's cross-motion.

### A. The Port's Responsibilities and Other General Points

> As a preliminary matter, the Port argues that the Port is not governed by trust and fiduciary standards in selling public property. While CRC cited to State law and persuasive commentary in the WPPA Handbook, CRC also cited to the Port's own governing document. CRC Br. at 21. Specifically, Port Resolution 378, the "Delegation of Authority" document states that the Port Commission ***acts as a trustee for the citizens in the Port District***: "The board [i.e. Commission] ***acts in trusteeship*** for port owners who are the citizens of the Woodland Port District." CP 332 (emphasis added). The Port blindly asserts without any authority that this official Port Resolution is "legally non-enforceable" and is just honorary language not intended to create a trust responsibility on the Port Commission. Port Br. at 26. The Port's position in this regard is consistent with its position elsewhere, namely that the Port has essentially unlimited discretion to sell public property at any price for any reason:

"Courts do not review municipal corporation's property sales." Port Br. at 17.[13] That position is contradicted by State law, the WPPA Handbook, and basic legal principles of judicial review. CRC Br. 18-22.

**B. The Port Abused Its Discretion in Determining that the Subject Property was Surplus**

CRC argued that the Port abused its discretion in determining that the Subject Property was surplus. CRC Br. at 22. Specifically, CRC stated that the Port gave no public notice for the public hearing on whether to surplus the Subject Property and that the Port falsely concluded that the Subject Property was "no longer needed for district purposes." RCW 53.08.090; CRC Br. at 22.

With respect to notice, CRC argued that, at that time, the Port determined that it needed to hold a public hearing in order to declare the Subject Property surplus. CP 367 at 47:16-21. Because the Port decided to hold a public hearing, it was incumbent upon the Port to provide public notice, however, no public notice was provided contrary to the standard practice of publishing notice in the newspaper—The Daily News. CP 380-1 at 101:18-25 to 102:1-3.[14] Addressing this, both the Port and

[13] The Port also cites McQuillin which contains the contradictory advice that courts will not intervene in municipal property sales unless "discretion is manifestly abused" and that such sales "are not subject to judicial review." Port Br. at 18. The two out-of-state cases relied on by McQuillin for these inconsistent rules fail are unpersuasive.

[14] The Port and CRRVP assert that a news release also was given i.e. a memo to the newspaper that the newspaper may or may not turn into a story. Port Br. at 21; CRRVP Br. at 9. That is not public notice, or at least not assurance of public notice. Besides, the existence of the alleged news release was never verified by production of such a

CRRVP vehemently state that the Port was under no obligation to hold a public hearing in the first place. CRRVP Br. at 18-19, Port's Br. at 20-21. Respondents miss the point. CRC is arguing that after the Port decided that it would be prudent to hold such a public hearing, it failed to comply with notification requirements of public meetings. CRC Br. at 22-23. In essence, the Port has attempted to claim the inherent benefits of a public hearing, *e.g.* open-government, public awareness, etc., despite not following the most basic requirement of all—actually notifying the public. CRC contends that these facts support the conclusion that the Port abused its discretion in making the surplus determination—Issue 1.

With respect to the surplus designation, at a minimum, the statute requires a declaration by the Port Commission that the property is "no longer needed for district purposes." RCW 53.08.090(1). The Port purposes are stated at RCW 53.08.020. CRC contends that a standard is set which the courts may enforce. CRC contends that the Port abused its discretion in declaring the Subject Property surplus. In response, the Port has argues against any limit at all on Port discretion and essentially contends that the existence of a Port resolution makes the issue unreviewable. Port's Br. at 18.

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document. CRRVP also claims that an "e-mail blast" was done, but the record citation does not support that fact. CRRVP Br. at 9.

In an attempt to support its argument, the Port cites *AGLO 1974 No. 101, 1974*, asserting that this opinion authorizes the Port to sell publically owned property which is not actually being used for a public purpose. The Port misapplies the Attorney General Opinion to this case. Port's Br. at 19. That Opinion clearly upholds the need to follow any "special statutory authority" regarding the sale of public property. Here, that statutory authority requires a declaration that the Subject Property is "no longer needed for Port purposes." In doing so, RCW 53.08.090(1) cannot be interpreted in the manner asserted by the Port—the Port might *need* property for Port purposes ***even though the property is not currently used for those purposes***. Similarly, the Port reliance on *City of Seattle v. Pacific States Lumber Co.,* 166 Wash. 517 (1932), is also misplaced. The Supreme Court held that the state statutes requiring a vote to sell a water system were not applicable because the sale was only of the timber incidental to the property's primary public use as municipal water system property. Again, that case does not alter the plain meaning of RCW 53.08.090(1).

In the end, the Port seems to argue that RCW 53.08.090(1) is merely procedural in nature and contains no substantive consideration as to whether or not Port property is actually surplus. Similarly, CRRVP takes the position that compliance with the statutory requirements was met

merely because the Port made a surplus declaration—there is no court review beyond that. CRRVP Br. at 18.[15] Such an interpretation however, would completely gut the statute and would allow ports to sell whatever property it wanted simply by passing a resolution. Here, the designation of the Subject Property as surplus was a sham as the Port clearly had other industrial purposes that it could have furthered using the property, which they chose to ignore.

### C. The Port Violated Its Trusteeship Duties and Abused Its Discretion by Selling the Subject Property at a Significant Discount to Fair Market Value

CRC contends that the Port owes both trustee and fiduciary duties to the public ***when selling real property*** in order to ensure full and complete protection for public assets. CRC contends that the Port violated these duties and abused its discretion because: (1) it was improper to give the unobligated credit for improvements; (2) the Port completely botched the consideration of appraisals and failed to sell the Subject Property for the low appraised value—even if flawed; and, (3) the Port did no marketing whatsoever and instead simply negotiated with one party. CRC contends that the Port's actions do not conform to sound business practices, and violate any reasonable legal standard applied to Port action.

[15] CRRVP also merges its equitable BFP defense into a discussion of CRC's statutory claims with many citations to *South Tacoma Way*. CRRVP Br. at 16-19. The BFP defense and *South Tacoma Way* are addressed separately.

CRC Br. at 24-29. The Port does not really accept that the Courts have any review authority of a Port sale of public property. Port Br. at 17-27. Similarly, CRRVP does not rebut CRC's contentions on these issues, but rather rests its argument on the non-reviewable nature of the surplus declaration. Otherwise, the Port's and CRRVP's factual discussions are rebutted in CRC's Statement of the Case. CRC Br. at 4-17. CRC contends that, at a minimum, the Court has power to void a sale of public property by the Port when the Port Commission abuses their discretion. The Port Commission did so for the reasons stated in its Opening Brief.

## VI.
## REBUTTAL TO OTHER MISCELLANEOUS DISTORTIONS AND MISSTATEMENTS

### A. The Port's New Contention That Cancellation of the Lease was Additional Consideration is Entirely Without Basis

The Port attempts to pursue a convoluted argument about additional consideration to the Port for the cancellation of the Lease—because the lease could not be terminated. Port Br. at 1, 13, 33. The first flaw with this contention is that it is belied by the Lease. Simply, on the very first page of the Lease can be found "Landlord's Right to Terminate." CP 132. This clause states that, "[i]f it is necessary for Port purposes and industrial development, as determined by Landlord in Landlord's sole discretion, the Landlord shall have the right to terminate this lease." *Id.*

This unilateral right to terminate obviates any need that the Port compensate CRRVP for its consent to terminate the lease. Accordingly, the Port's repeated contention that consent to terminate was valuable consideration to the Port fails under the plain language of the lease.

The next flaw is that this contention is not supported by the record—the Port Commission never cited or discussed this point as supporting the sale. *See, e.g.,* CP 289 (Memorandum discussion sale price and grounds); CP 297-308 (meeting transcript when sale approved). The Port did not even raise this contention to the trial court. CP at 82-83 (joinder of CRRVP Motion only, no briefing).[16] Otherwise, the Lease to CRRVP was another instance of the Port giving away property rights in violation of the Gift Clause. However, that issue is moot since the Lease was replaced by the sale. Nevertheless, it is ludicrous for the Port to argue that because the Port gave CRRVP a bad lease in the first place, that bad lease is a reason to accept less money from CRRVP to purchase the Subject Property. The Port's contention just further demonstrates its backwards logic used here to justify this private sale.

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[16] This issue may be barred under RAP 2.5 because, "[f]ailure to raise an issue before the trial court generally precludes a party from raising it on appeal." *Smith v. Shannon*, 100 Wn.2d 26, 37 (1983). Nevertheless, even if the Court does consider this argument, it is still barred as an impermissible *post hoc* rationalization of an agency's action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("courts may not accept appellate counsel's *post hoc* rationalizations for agency action."). For this reason alone, the Court should disregard this argument.

### B. CRRVP Never Had a Right of First Refusal

Both the Port and CRRVP erroneously claim that CRRVP was granted a right of first refusal to purchase the Subject Property. CRRVP Br. at 5; Port Br. at 10. The Port later admits that no signed right of first refusal exists between the Port and CRRVP. Port Br. at 10. The simple, incontrovertible fact, as evidenced by the record, is that CRRVP did not have a right of first refusal. No such document is in the record. This erroneous assertion made by both Respondents is based upon their reliance upon the equally incorrect statement made by Ms. Temming in her declaration. CP 35.[17] At best, it appears that a right of first refusal might have been discussed—but was never finalized. CP 421 (56, 57:1-9) (right of first refusal "never got consummated"). Regardless, Respondents never actually explain how a right of first refusal actually changes anything about this case. Even if a right of first refusal existed, CRRVP did not match another person's offer since there was no other offer. *See Matson v. Emory,* 36 Wn. App. 681, 683 (1984) (describing right of first refusal). In fact, had there been another offer, forcing CRRVP to match it would have been more of a market transaction then the private sale that occurred here.

[17] CRRVP also cites CP 182-83 for the proposition that it had a right of first refusal to purchase the Subject Property. However, CP 182-83 comprise of pages from the Integra Appraisal which contain no discussion whatsoever about a right of first refusal on the property or even CRRVP's relationship with the Subject Property for that matter.

### C. Other Reductions in Price Were Not Justified

Within its brief, the Port argues that the Port was justified in reducing the purchase price of the Subject Property due to the "lack of utilities to the property." Port Br. at 10. That reduction was not justified by the Port's own appraisal, which factored in the lack of utilities within its appraised value of $65,000. The appraisal report explained that the property was not served by sewer and water (CP 67, bottom paragraph), and then for comparable sales, determined that the "best sales" were ones "not currently served with public sewer and water." CP 69 (bottom paragraph). This justification again shows that the Port was ignoring, rather than relying upon, its own appraisals. The Port was not trying to get the best price or even a fair price, but appears to have been simply trying "to get the price down" to what CRRVP could afford to pay. CRRVP Br. at 27. A similar unjustified discount was the final adjustment downward by an additional $1,000 to $44,000 with no explanation except to comply with CRRVP's request. CP 386 at 123:1-11; CP 289. Another misstatement by the Port as to the value of the Subject Property is the assertion that the Subject Property was assessed for only $3,340. Port Br. at 12 (citing CP 48). That low assessed value was for the 0.14 acre sliver to the north while the appraisal lists the assessed value of the Subject Property as $65,390. CP 48 (Adjustment A and Account No. R092266).

### D. Reliance on Self-Serving Statements of Port Commissioners is Misplaced

The Port and CRRVP cite to various self-serving statements of the three Port Commissioners to support the assertion that they did not have donative intent. Port Br. at 15-16; CRRVP Br. at 11-13. The trial court did not rely on these statements, calling them self-serving. RP 5/8/13 17:16-18 (not "particularly compelling one way of the other").

Additionally, the comments of individual commissioners do not represent official statements of the Port Commission which can only act as a body in a public meeting. Thus, on its face, the comments are not dispositive as to the Port Commission's or Port's actions or intent. The **self-serving statements** that this transaction was without donative intent are improper because they are no different than expressing an opinion that a civil defendant is negligent or that a criminal defendant is guilty—both of which are barred by the rules of evidence. Tegland, *Courtroom Handbook on Washington Evidence* at 331-332, § 704:5 (2013-2014 Edition). The trier of fact could very well find that these self-serving statements are not credible or should be given no weight. For example, the Commissioners were not aware that the Lease barred reimbursement for leasehold improvements. *See, e.g.,* CP 495 (71:12-22). Washington law is clear that "[t]he existence or absence of intent to make a gift **is an**

**evidentiary issue to be resolved by the finder of the fact.**" *Buckerfield's Ltd. v. B. C. Goose & Duck Farm Ltd.*, 9 Wn. App. 220, 224 (1973) (emphasis added); *see also In re Estate of Pearl Fitzhugh Little,* 106 Wn.2d 269, 288 (1986) ("donative intent is a factual issue to be resolved by the trier of fact"). The reason for this is directly derived from the need for the trier of fact to ascertain credibility based on witness demeanor, fairness, candor, surrounding facts and circumstances, etc. *In re Gallinger's Estate*, 31 Wn.2d 823, 829 (1948) (rejecting Volgleson's self-serving testimony). In other words, the trier of fact should hear and analyze the *totality of the circumstances* surrounding the allegation of an unconstitutional gift of public funds as opposed to only considering the subjective testimony of the government actors. The *Gallinger* case applies here, especially given the Port's self-serving testimony. Specifically, Respondents assert that the Port had no donative intent simply because the Port Commissioners have stated as such. However, this assertion ignores the painful reality that individuals charged with violating the law seldom testify to their guilt or culpability. Indeed, the Port Commissioner's statements are the exact kind of "self-serving" testimonies barred as an opinion on the ultimate issues and the type of testimony that can be overcome by the weight of surrounding evidence as occurred in *Gallinger.*

## CONCLUSION

The Superior Courts in this State regularly hold trials in eminent domain cases where the parties hold a stark difference of opinion about the value of real property. The Gift Clause claim in this case is not much different. The Port and CRRVP contend that the Port received adequate consideration for the land based on the $44,000, and CRC contends that the Port should have received $206,000. Requiring a trial of such facts is hardly a remarkable occurrence. But, the Port contends that the threat of judicial oversight of Port sales would constitute improper micromanaging" and "interference with government power." CRC contends that the Constitutional mandate in the Gift Clause necessarily requires some degree of oversight and potentially even interference. That is also not remarkable—government entities are in Court essentially every day in this State defending their actions. This Court should reinvigorate the Gift Clause or otherwise remedy this egregious abuse of power.

RESPECTFULLY submitted this 21st day of November, 2013.

GROEN STEPHENS & KLINGE LLP

By: 

Charles A. Klinge, WSBA #26093
W. Forrest Fischer, WSBA #44156
Attorneys for Appellant

**DECLARATION OF SERVICE**

I, Linda Hall, declare as follows pursuant to GR 13 and RCW 9A.72.085:

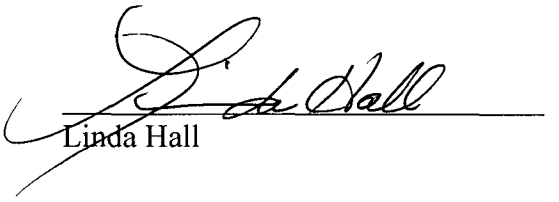
I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On November 21, 2013, I caused the foregoing document to be served on the following persons via the following means:

| | |
|---|---|
| **Attorneys for Port of Woodland and Commission of the Port of Woodland:**<br>Earl W. Jackson<br>Jackson, Jackson & Kurtz, Inc., P.S.<br>704 E. Main St., Ste. 102<br>P.O. Box 340<br>Battle Ground, WA 98604 | ☐ Hand Delivery via Legal Messenger<br>☒ First Class U.S. Mail<br>☐ Federal Express Overnight<br>☐ Electronic Mail:<br>☐ Other: |
| **Attorneys for CRRVP LLC:**<br>Robert G. Casey<br>Terrence J. Donahue<br>Chrystina R. Solum<br>Eisenhower Carlson PLLC<br>Wells Fargo Plaza<br>1201 Pacific Ave., Suite 1200<br>Tacoma, WA 98402 | ☐ Hand Delivery via Legal Messenger<br>☒ First Class U.S. Mail<br>☐ Federal Express Overnight<br>☐ Electronic Mail:<br>☐ Other: |
| David C. Ponzoha, Court Clerk<br>Court of Appeals, Division II<br>950 Broadway, Ste. 300<br>Tacoma, WA 98402-4454 | ☐ Hand Delivery via Legal Messenger<br>☒ First Class U.S. Mail<br>☐ Federal Express Overnight<br>☐ Electronic Mail: |

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 21st day of November, 2013 at Bellevue, Washington.



Linda Hall